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Nos. 94-805, 94-806, 94-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE W. BUSH, GOVERNOR OF TEXAS, *et al.*,
Appellants,

v.

AL VERA, *et al.*,
Appellees.

REV. WILLIAM LAWSON, *et al.*,
Appellants.

v.

AL VERA, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellants.

v.

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Appellees.

On Appeal from the United States District Court for the Southern District of Texas

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BRIEF AMICI CURIAE OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE SUPPORTING APPELLANTS

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INTEREST OF AMICI

The Democratic National Committee is the national political organization of the Democratic Party.[1] The Democratic Congressional Campaign Committee is the political organization for Democratic Members of the United States House of Representatives and is responsible for assisting Democratic candidates running for election to the House.

These *amici* have a direct interest in the standards that may be established in this case to guide the future creation of congressional districts. In particular, they believe it is important that this Court maintain its traditional understanding that legislative redistricting is a political process that is primarily the responsibility of state legislatures. While the courts have a responsibility to eradicate racial discrimination that violates the Constitution, *amici* are concerned that the Equal Protection Clause should not become a weapon for those who simply disagree with the particular political judgments made by a State's elected representatives. For the reasons stated here, *amici* believe that is precisely what occurred in this case.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the brief of the state appellants.

SUMMARY OF ARGUMENT

1. In a case where a State's districting plan is challenged as a "racial gerrymander" under *Shaw v. Reno*, 113 S. Ct. 2816 (1993), strict scrutiny is justified only if the court finds that the State "subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995). *Amici* submit that this standard was not met in this case

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[1] Letters of consent to the filing of this brief by all parties have been filed with the Clerk.

because the predominant factor that determined the borders of the districts invalidated below was not race but a consistently applied state policy of protecting incumbents.

a. Protection of incumbents is clearly one of the legitimate policies that a State may pursue in the course of creating new legislative districts. The Court has so recognized in the related line of cases dealing with the requirement of equal population. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *White v. Weiser*, 412 U.S. 783, 791 (1973). Moreover, there are a number of good reasons why a State might pursue a policy of protecting its incumbent Members of Congress. Such a policy helps to insure that Representatives will have sufficient experience to perform their jobs, helps to promote stability and diversity in the representation of a State's citizens, and can produce concrete benefits because Congress is organized so that power correlates with seniority.

Texas has long pursued an effective, race-neutral policy of protecting incumbents of both parties. It did so in the 1990s, not only in the design of the districts at issue here but statewide. There is every reason why a court should defer to that quintessentially political choice.

b. Once it is clear that incumbent protection can be an independently valid state policy pursued in districting, the proper outcome in this case is not difficult to discern. As even the district court recognized, the driving force in the creation of Districts 18, 29, and 30 was protection of incumbents, as various Representatives fought fiercely over details that might affect their reelection chances. It is true that voters' race was often "considered" in this process—because there is a strong correlation between race and voting behavior in Texas—but such consideration very often had the effect of *dispersing* minorities through the exclusion of minority areas from the new majority-minority districts. Similar phenomena occurred statewide, as the State created other "non-compact" districts designed to protect incumbents—districts the court below left undisturbed.

To be sure, the State also made the decision that Districts 18, 29, and 30 should be majority-minority. But the district court did not appear to have a problem with that decision itself. After all, Texas had experienced huge growth in minority populations in Houston and Dallas and there was every reason to expect that it would create districts allowing those minority communities to elect Representatives of their choice.

Thus, what the district court held, in effect, was that the State could pursue its policy of incumbent protection by creating non-compact districts, and it could create new majority-minority districts, but it could not do both simultaneously. This was legal error, because it did not amount to a determination that racial considerations predominated over other traditional state policies, including the policy of incumbent protection. It is also an approach that carries with it the danger of exploding any limits on *Shaw*-type claims. There is no apparent basis for saying that it was unconstitutional for Texas to move minority/Democratic areas into "Democratic" districts, while moving nonminority/Republican areas into "Republican" districts only in the course of creating Districts 18, 29, and 30, and not elsewhere. But if such a practice becomes illegal generally, *Shaw* will have become a vehicle for attempting to eradicate not race but politics from redistricting.

2. Even if this Court determines that strict scrutiny does apply here, it should still uphold the Texas districting scheme in its entirety. The creation of majority-minority districts in Houston and Dallas was justified as serving the compelling interest in compliance with Section 2 of the Voting Rights Act. Because that is true, a court should not be permitted to second-guess *how* the State chose to go about creating those districts—*i.e.*, its choice to continue to pursue its policy of incumbent pro-

tection, even if it meant the creation of highly "non-compact" majority-minority districts.

ARGUMENT

The sole claim in this case was that the State of Texas, in establishing its congressional districts, had engaged in unconstitutional "racial gerrymandering" within the meaning of *Shaw v. Reno, supra.* In such a case, as this Court made clear last Term, it was the plaintiffs' burden to show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 115 S. Ct. at 2488. "To make this showing," the appellees were required to "prove that the legislature *subordinated traditional race-neutral districting principles*, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, *to racial considerations.*" *Ibid.* (emphasis added). Acting prior to this Court's decision in *Miller*, the district court held that appellees had proved a "racial gerrymander" with respect to three "majority-minority" districts—two in the Houston area and one in the Dallas area.

As *amici* see it, the key issue here is whether the district court properly reached that conclusion based on the fact that the districts are majority-minority and very irregularly shaped—in a case where the evidence showed that such "non-compactness" came about, not as a means of producing majority-minority districts, but as a result of a consistently applied state policy of protecting incumbent Representatives. The district court did not dispute that a State may create majority-minority districts. Nor did it invalidate the other "non-compact" districts created statewide in order to protect incumbents, despite its recognition that these districts were often designed so that heavily minority, Democratic areas are included in "Democratic" districts and excluded from "Republican"

ones. *See* 861 F. Supp. at 1326-28, 1344-45 (noting that this pattern occurred throughout the State). But it held, in effect, that when these phenomena occur simultaneously—when districts are majority-minority and very irregular in shape, and there is evidence that areas with heavy concentrations of minority voters were deliberately included in, and excluded from, those districts for political reasons—the results somehow become unconstitutional "racial gerrymanders."

That is not, and should not be, the law. In such a case, the "predominant factor" guiding the legislature's hand is not race but an entirely legitimate state interest in protecting incumbents. Anyone attacking that state policy in court should be required to meet the much more demanding standards applicable to "*political* gerrymander" claims under *Davis v. Bandemer*, 478 U.S. 109 (1986).[2] Unless this distinction is maintained, the *Shaw/Miller* doctrine will become a mechanism for waging political warfare, and the federal judiciary, in turn, will end up with much of the direct responsibility for redistricting, despite this Court's oft-stated commitment to allowing state legislators to retain the primary role in this process. *See Miller*, 115 S. Ct. at 2488; *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156-57 (1993); *Growe v. Emison*, 113 S. Ct. 1075, 1081 (1993).

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[2] We note that, prior to this case, Republican plaintiffs attempted to prove that the Texas congressional districting plan was a "political gerrymander" under *Davis* v. *Bandemer*, but that claim was rejected. *See Terrazas v. Slagle*, 789 F. Supp. 828, 834-35 (W.D. Tex. 1991) (three-judge court), *aff'd mem. sub nom. Richards v. Terrazas*, 112 S. Ct. 3019 (1992); *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172-75 (W.D. Tex. 1992) (three-judge court).

I. STRICT SCRUTINY IS NOT JUSTIFIED, UNDER THIS COURT'S PRECEDENTS, WHERE THE PRIMARY FACTOR AFFECTING A DISTRICT'S SHAPE IS THE STATE'S COMMITMENT TO PROTECTING THE INTERESTS OF INCUMBENTS.

As we have noted, the district court was only authorized to second-guess the State's district lines to the extent that they reflected a subordination of neutral districting principles to racial considerations. As Justice O'Connor put it in *Miller*, "[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices." 115 S. Ct. at 2497. It is not enough simply to show that "race [was] considered in the redistricting process." *Ibid.*

This standard, in turn, must be applied with "extreme caution," if courts are to respect the settled rule that " 'reapportionment is primarily the duty and responsibility of the State.' " *Id.* at 2488 (majority opinion) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Ibid.* Legislatures, for example, will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Ibid.*[3] More-

[3] We note that the obligation to accord deference to state legislatures in this area should be seen as continuing even after there is a finding that a particular districting plan is unconstitutional. *See Upham v. Seamon*, 456 U.S. 37, 40-44 (1982) (per curiam); *White v. Weiser*, 412 U.S. at 793-97. Since *Shaw*, the lower courts have shown a troubling tendency to take over the districting process for themselves during this remedial phase. *See, e.g., Johnson v. Miller*, 864 F. Supp. 1354, 1359, 1393 (S.D. Ga. 1994) (three-judge court) (per curiam) (explaining that the district court was planning to "impose" its own redistricting plan for the November 1994 elections and that the State of Georgia would be at liberty "to revisit the issue" of redistricting *after* the elections), *aff'd and remanded*, 115 S. Ct. 2475 (1995); *Hays v. Louisiana*, 862 F. Supp. 119, 124-25

over, the fact that a districting plan may have been politically influenced provides no basis for judicial intervention. It would make no sense for courts to "attempt[] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

The district court, in this instance, simply did not follow these precepts. It failed to accord appropriate deference to the State's legitimate political determination that protection of incumbents would be a major guiding principle in the districting process. Instead, it denigrated incumbency protection as an unseemly part of the pattern of "racial gerrymandering" it thought it had discerned. Moreover, the court's decision to invalidate three of the State's electoral districts ultimately was based on a hodgepodge of criticisms of features of the districting process, none of which, taken separately, is illegitimate.

In our view, it is quite clear that a consistently applied policy of incumbency protection should be treated as a "traditional race-neutral districting principle" worthy of respect by the federal courts. Where, as here, that principle has played a primary role in determining the final shape of districts statewide (while other principles like compactness have been given little weight by the legislature), it makes no sense to single out three districts for special scrutiny simply because they have a majority of minority voters and appear to a court to be particularly irregular in shape."[4] Those facts, by themselves, simply

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(W.D. La. 1994) (three-judge court) (district court appointed a special master and, using a computer program loaded with demographic data, drew its own redistricting plan; district court neither held a remedial hearing nor provided the parties an opportunity to comment), *vacated and remanded sub nom. United States v. Hays*, 115 S. Ct. 2431 (1995).

[4] *Cf. Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989) (three-judge court) (holding that districts proposed by Section 2 plaintiffs were "sufficiently . . . geographically compact" because they were "not materially stranger in shape than at least some

do not establish the subordination of neutral districting principles to racial considerations.

A. Incumbency Protection Is a Traditional and Constitutionally Legitimate Basis for Drawing Districts.

In *Miller*, this Court listed four examples of the "traditional race-neutral districting principles" that, unlike race, may play primary roles in guiding state districting choices. These were "compactness, contiguity, respect for political subdivisions [and respect for] communities defined by actual shared interests." 115 S. Ct. at 2488. At the same time, this Court expressly acknowledged that this list was not exclusive. *See ibid.* (the list of traditional race-neutral districting principles "includ[es] but [is] not limited to" the four above-listed principles); *see also ibid.* (referring to "these *or other* race-neutral considerations") (emphasis added).

In this case, the State argues that a fifth districting principle worthy of judicial respect is the principle of protecting the reelection prospects of incumbent Members of Congress. This contention is clearly correct. After all, the legitimacy of incumbency protection as a districting criterion has long been accepted by this Court in a related context: the line of cases dealing with the requirement that districts have equal population.[5] This Court has held that minor variance among the populations of districts in the same State may be justified by "consistently applied [nondiscriminatory] legislative policies" such as "making districts compact, respecting municipal boundaries, pre-

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of the districts contained in the present apportionment plan"), *aff'd mem.*, 498 U.S. 1019 (1991).

[5] Some of the equal-population cases cited *infra* dealt with congressional districts and therefore implicated Article I, Section 2 of the Constitution, but the same principles hold true under the Equal Protection Clause of the Fourteenth Amendment. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1031 (D. Md. 1994) (three-judge court) (per curiam).

serving the cores of prior districts," *Karcher v. Daggett*, 462 U.S. at 740, "avoiding contests between incumbent Representatives," *ibid.*; *see Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966), and "maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives," *White v. Weiser*, 412 U.S. at 791.[6] Thus, in the context of justifying deviations from population equality, this Court has considered the protection of incumbents on a par with compactness and respect for political subdivisions. There is no reason to treat this state interest any differently in the context of a *Shaw* claim.

Moreover, there are at least three independent reasons why States are justified in deciding that it makes sense to protect congressional incumbents. First, incumbency protection promotes experience in the legislature. Properly representing a diverse population of more than half a million Americans requires skills and knowledge that are often best acquired on the job. Thus, by protecting its House incumbents, a State may reasonably conclude that it is enhancing the quality of its representation in Congress. *See* Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 Sup. Ct. Rev. 175, 226-27; Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in *Representation and Redistricting Issues* 7, 17 (Bernard Grofman *et al.* eds., 1982); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. Rev. 1, 45 (1985).

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[6] *See also Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 397-98 (D. Md. 1991) (three-judge court) (holding that "recognizing incumbent representation, with its attendant seniority, in the House of Representatives" is a "convincing . . . and legitimate justification[]" for deviating from absolute population equality), *aff'd mem.*, 504 U.S. 938 (1992).

Second, bipartisan incumbency protection of the sort at issue in this case promotes stability by preventing small swings in the popular vote from having huge effects on the composition of the State's congressional delegation. Thus, incumbency protection assures Democrats and Republicans alike a substantial presence in the delegation, which in turn makes it more likely that a diversity of voices will continue to represent a given State. *See* Lowenstein & Steinberg, *supra*, at 39-40; Bernard Grofman & Harold A. Scarrow, *Current Issues in Reapportionment*, 4 Law & Pol'y Q. 435, 446 (1982); *see also* David Butler & Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 75-76 (1992) (explaining that incumbency protection enhances the ability of sitting Members to defy national swings and thereby prevents either major party from being decimated by such swings). Although governmental stability, when taken to an extreme, may sometimes squelch innovation, in moderate doses it is, as James Madison explained, "essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society." The Federalist No. 37, at 226 (Clinton Rossiter ed., 1961).

Third, because the U.S. House of Representatives allocates power among its Members largely according to seniority, it is very reasonable for a State to believe that continued incumbency will provide concrete benefits. *See U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1912 (1995) (Thomas, J., dissenting) ("[T]he internal rules of Congress put a substantial premium on seniority, with the result that each Member's already plentiful opportunities to distribute benefits to his constituents increase with the length of his tenure."). Although the congressional seniority system has a long pedigree, *see* Woodrow Wilson, *Congressional Government* 102 (1885), state policies favoring incumbency protection in redistricting became particularly crucial in the wake of internal

reforms in the House of Representatives in the early part of this century. In 1910, when Speaker Joseph Cannon wielded his authority arbitrarily and passed over senior Members for assignments, the House revolted, removing committee assignment power from the Speaker. "[S]eniority came to be the most important criterion for committee assignments and chairmanships, and committees rather than parties became the major policy actors." David W. Brady, *After the Big Bang House Battles Focused on Committee Issues*, Pub. Aff. Rep., Mar. 1991, at 32. As two political scientists explained,

> [n]ew members found themselves at the bottom of internal career ladders that they could ascend only through continued service. Although the party and committee reforms of the 1970s multiplied the number of career ladders, long service is still a prerequisite for top leadership posts; even when strict seniority is violated, the choice invariably falls to experienced members. (In 1992, for example, House Democrats removed an ailing eighty-two-year-old chairman in favor of an eighty-three-year-old who ranked second on the committee.)

Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* 37 (4th ed. 1994). *See generally* Barbara Hinckley, *The Seniority System in Congress* (1971); Nelson W. Polsby, Miriam Gallaher & Barry Spencer Rundquist, *The Growth of the Seniority System in the U.S. House of Representatives*, 63 Am. Pol. Sci. Rev. 787 (1969). The importance of committee chairs under the seniority system was succinctly underscored by the advice that Speaker John McCormack gave to freshmen Members of Congress: "Whenever you pass a committee chairman in the House, you bow from the waist. I do." *Wall Street Journal*, May 3, 1979, at 1, *quoted in* Davidson & Oleszek, *supra*, at 207.

In Texas the policy of protecting congressional incumbents has had a long and fruitful history. The federal facilities and funds that flowed to Texas during Sam

Rayburn's rise to the Speakership of the House are legendary,[7] and the lessons learned from the Rayburn era have never been forgotten in Austin. Following the 1960 census, when population increases mandated the expansion of the Texas delegation from 22 to 23 Members, the state legislature opted to create one statewide at-large district rather than to rearrange existing disricts and threaten the reelection prospects of the 22 incumbents who had already attained considerable seniority. *See* 861 F. Supp. at 1312; *Bush v. Martin*, 251 F. Supp. 484, 489 n.10 (S.D. Tex. 1966) (three-judge court); *Bush v. Martin*, 224 F. Supp. 499, 505 n.7 (S.D. Tex. 1963) (three-judge court), *aff'd per curiam*, 376 U.S. 222 (1964).[8] Protection of incumbents also played a central role in the 1970s and 1980s rounds of redistricting. *See, e.g., White v. Weiser*, 412 U.S. at 791 & n.10; *Seamon v. Upham*, 536 F. Supp. 931, 950-61 (E.D. Tex.) (three-judge court), *vacated on other grounds*, 456 U.S. 37 (1982) (per curiam); *id.* at 994-1027 (Justice, C.J., concurring in part and dissenting in part). By the time of the 1992 elections, Texas' 27 Congressmen had accumulated more than *325 years* of total seniority in the House, and held the chairmanships or ranking memberships of four full committees and eleven subcommittees. *See Congressional Quarterly's Politics in America: 1992, the 102nd Congress* 1409-91 (Phil Duncan ed., 1991). Thus, incumbent protection not only is a "customary and traditional districting practice[]" in Texas, *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring), it is one that the State has a substantial interest in pursuing.

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[7] *See generally* Anthony Champagne, *Congressman Sam Rayburn* (1984); D.B. Hardeman & Donald C. Bacon, *Rayburn: A Biography* (1987); Alfred Steinberg, *Sam Rayburn* (1975).

[8] From 1933 to 1965, Texas redrew its congressional map only once (in 1957), and even then it left 12 of its 22 incumbents' districts perfectly intact and made only relatively minor changes in the 10 other incumbents' districts. *See Bush v. Martin*, 224 F. Supp. at 507 & n.14.

Historically, the protection of incumbents in Texas has also been a race-neutral phenomenon. The 1970s round of redistricting protected two incumbents (Congressmen E. "Kika" de la Garza and Henry B. Gonzalez) from majority-Hispanic districts in South Texas and San Antonio (Districts 15 and 20, respectively).[9] The 1980s round of redistricting protected not only those two Mexican-American Congressmen, but also the late Congressman Mickey Leland, an African-American who represented Houston's majority-minority District 18, which had been created in 1971 for a rising star in the Texas State Senate, Barbara Jordan. *See Seamon v. Upham*, 536 F. Supp. at 950-60; *Politics in America: Members of Congress in Washington and At Home* 1487, 1496, 1502 (Alan Ehrenhalt ed., 1983).

In sum, there is no basis in law or policy for failing to accord full respect to a State's decision to give great weight to this factor, as it undertakes the complex process of redistricting. To do otherwise would be to substitute this Court's preferred political perspective for that of a State's elected representatives.

B. Incumbency Protection, Not Race, Was the Predominant Motivating Factor in Determining the Shapes of the Districts Invalidated by the District Court.

Once it is accepted that incumbency protection constitutes a neutral and legitimate districting principle, the proper outcome in this case becomes clear. As even the district court seemingly acknowledged, the State's commitment to protecting incumbents, far from being subordinated to illegitimate racial considerations, effectively "drove" the process in Dallas and Houston, as elsewhere

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[9] Through the accretion of seniority, Congressmen de la Garza and Gonzalez eventually rose to the chairmanships of two powerful House committees—Agriculture and Banking, Finance and Urban Affairs, respectively. *See Congressional Quarterly's Politics in America: 1992, the 102nd Congress, supra*, at 1456-59, 1470-73.

throughout the State. Thus, all 27 incumbents were included in the districting process,[10] and the resulting plan allowed 26 of them to be reelected in 1992. *See Congressional Quarterly's Politics in America: 1994, the 103rd Congress* 1435-530 (Phil Duncan ed., 1993). And the district court itself emphasized the lengths to which the State went in this effort. It noted that "never before have districts been drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of the incumbents." 861 F. Supp. at 1334. It concluded that the "final result seems not one in which the people select their representatives, but in which the [incumbent] representatives have selected the people." *Ibid.*

The district court, however, effectively side-stepped the impact of its own determination that incumbent protection dominated the districting process. It did so in part by refusing to treat this as a legitimate state policy. It stated that "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion," and that the "State's realization of [this] goal may not fully undo the traditional principles of districting that *Shaw* uses as a benchmark." *Ibid.*

It then sought to erase the distinction between a policy of incumbent protection and the "racial gerrymandering" it thought it had identified. The court acknowledged that incumbent Members of Congress from districts bordering on the new majority-minority Districts 29 and 30 had made intense efforts to retain Democratic voters, but noted that "*many* of the voters being fought over were" minorities. 861 F. Supp. at 1338 (emphasis added).[11]

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[10] The district court observed: "As has historically been the case, Congressional incumbents were actively involved in the redistricting process." 861 F. Supp. at 1317.

[11] Many others, of course, were not. *See, e.g.*, 861 F. Supp. at 1321 (describing struggle over ultimate placement of the majority-white but Democratic community of Grand Prairie in the Dallas

As a result, many African-Americans were both included in, and excluded from, District 30 in Dallas. *See id.* at 1322 ("[I]ncumbent protection in Dallas County involved the allocation of African-American voters among the districts."). From this, the court drew the incomprehensible conclusion that "racial gerrymandering was an essential part of incumbency protection" in the Dallas area, "as African-American voters were deliberately *segregated* on account of their race *among several* Congressional districts." *Id.* at 1339 (emphasis added); *see also id.* at 1341 (in Houston, as in Dallas, "the goal of incumbent protection was itself realized by the deliberate segregation of voters on the basis of race," with "[i]ncumbent Democrats . . . fencing minorities into their districts *or* into the new majority-minority districts, while those same minorities were effectively being removed from Republican incumbents' districts") (emphasis added).

In sum, the court failed to see any distinction between segregation of one racial group into a given district *because of their race*, and consideration of voters' race as one part of a process that (1) was aimed at achieving another legitimate objective (incumbency protection) and (2) led to the distribution of minorities into a variety of districts, as it was deemed necessary to achieve that other objective. This Court in *Miller* emphasized "[t]he distinction between being aware of racial considerations and being motivated by them," [12] noting that the difficulty of

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area); *id.* at 1322 (describing how Congressman John Bryant sought to keep a majority-white East Dallas neighborhood in his District 5, rather than in District 30); *id.* at 1325 ("Senator Green's insistence on including his primarily Anglo 'home' precincts in District 29 had the effect of diluting the Hispanic population percentage of the district."); *id.* at 1346-47 (Hittner, J., specially concurring) (describing how Congresswoman Eddie Bernice Johnson successfully fought to extend her district into the northern part of Dallas County in order to reach Jewish voters).

[12] The *Miller* Court quoted *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979), where the Court had held that discriminatory

drawing this key distinction "requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race." 115 S. Ct. at 2488; *see United States v. Hays*, 115 S. Ct. 2431, 2436-37 (1995). The ruling of the district court is a clear departure from these principles.

Moreover, if the State's conduct here constituted "racial gerrymandering" it is difficult to see the difference between what occurred in Districts 18, 29 and 30 and district lines drawn elsewhere in Texas (and throughout the country) that had the evident purpose of bringing heavily minority and pro-Democratic areas into certain districts while placing white and Republican areas into others. The district court's own findings, 861 F. Supp. at 1326-28, 1344-45, describe dozens of examples of this phenomenon—examples that are inevitable whenever a State sets out to protect incumbents and there is a strong correlation between race and voting patterns, as there is here. But the district court, quite properly, rejected appellees' challenge to these districts and instead expressly held that they were *not* "the product of racial gerrymandering or intentional racial discrimination." *Id.* at 1309; *see id.* at 1344-45.

To be sure, one possible difference is that the State also wanted District 18 to remain a majority-minority district and decided that two of the new districts (29 and 30) should be majority-minority districts in Houston and Dallas, respectively. But while noting this fact, the district court did not suggest that these decisions were themselves improper. After all, of the roughly 2.75 million increase in Texas' population since the last census, fully *three-fifths* of that increase could be accounted for by

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purpose " 'implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects.' " 115 S. Ct. at 2488.

growth in the number of Hispanics and African-Americans, primarily in Harris County (Houston), Dallas County (Dallas), Bexar County (San Antonio), and the less urbanized counties of South Texas. *See id.* at 1311-12.[13] Thus, as the district court recognized, it was both "foreseeable" and quite appropriate that the State would place the three new congressional districts in these areas. *Id.* at 1344. Such a choice makes perfect sense in light of another "traditional race-neutral districting principle[]"—the principle of "respect[ing] . . . communities defined by actual shared interests." *Miller*, 115 S. Ct. at 2488. Indeed, the district court pointed out that it was possible to construct majority-minority districts in Houston and Dallas that were far more compact than those ultimately created, 861 F. Supp. at 1342, making clear that the court saw nothing wrong with creating such districts. *See also id.* at 1344 (upholding "designedly Hispanic" District 28 in San Antonio and South Texas).

What seems to have really troubled the district court was not that the State included and excluded racially identifiable areas to protect incumbents, and not that it created majority-minority districts, but that, in doing both of these things, the State also created districts with very irregular shapes. Non-compactness, of course, is not itself illegal,[14] and is not a characteristic unique to these three districts in Texas.[15] But when this characteristic was

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[13] Indeed, the increase in the population of the Hispanic minority *alone* was nearly one-and-a-half times the increase in the population of Texas' Anglo majority. *See ibid.*

[14] In *Shaw*, all nine Justices agreed that compactness is not required by the Constitution. *See Shaw*, 113 S. Ct. at 2827 (citing *Gaffney v. Cummings*, 412 U.S. at 752 n.18); *id.* at 2841 (White, J., joined by Blackmun and Stevens, JJ., dissenting); *id.* at 2849 (Souter, J., dissenting).

[15] Districts 6 and 12, for example, are two districts with white majorities that share a highly irregular border, evidently designed

combined with the majorities of minority voters present in Districts 18, 29, and 30, the result was districts that had the superficial appearance of the kinds of districts condemned in *Shaw* and *Miller*—even though they were the product of a quite different process. What the court ultimately held was that, because of this "appearance" problem, a (perfectly legal) decision to create and preserve majority-minority districts in Dallas and Houston could not co-exist with a (perfectly legal) decision to create non-compact districts whenever reallocation of particular areas with high and low minority populations would serve the broader state policy of protecting incumbents. In *Miller*, this Court held that a "bizarre" shape is not a necessary element of a *Shaw* claim. 115 S. Ct. at 2486-88. In this case the Court should make it equally clear that a showing that a majority-minority district has a very irregular shape is not necessarily a *sufficient* basis for a *Shaw* claim: in some cases, as here, there simply is no causal connection between that shape and the racial composition of the district.

As we have suggested, the problem with the district court's analysis is not just that it is wrong but that it is prone to expansion. Race correlates strongly with voting patterns in many parts of this country. In those places, lines drawn to protect incumbents will often have the appearance and effect of separating heavily minority communities from nearby white communities. Assuming that was illegal here, when undertaken to protect incumbents in the context of creating (otherwise permissible) majority-minority districts, it is difficult to see why it is any less illegal elsewhere. But if that becomes the law, then courts will have gone a long way toward imposing their preferred approach to districting, while prohibiting States from adopting a policy of protecting incumbents.

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to assist incumbent Republican Joe Barton and incumbent Democrat Pete Geren.

In sum, the result below was caused by a basic legal error—the failure of the district court to treat incumbency protection as a fully legitimate districting principle that played the predominant role in the actual process in Texas. Once that error is corrected, the basis for applying strict scrutiny in this case evaporates.

II. EVEN IF STRICT SCRUTINY IS APPLIED, THE DISTRICTS SHOULD PASS CONSTITUTIONAL MUSTER.

Even assuming that this Court decides that strict scrutiny applies, *amici* still believe that the district court's ruling should be reserved. The State had a compelling interest in creating these districts and the particular means selected were narrowly tailored to serve that interest.

First, with respect to the compelling interest, the State had an ample factual basis for determining that the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971 *et seq.*, required it to maintain a majority-minority district in Houston and to create additional majority-minority districts there and in Dallas. As the district court noted, it was certainly possible to create relatively compact, contiguous majority-minority districts in these locations. That fact, combined with the history of racial bloc voting in Texas and the shortfall between the proportion of minorities in the state population and the number of districts in which they had a reasonable opportunity to elect representatives of their choice, *see Johnson v. DeGrandy*, 114 S. Ct. 2647, 2664 (1994) (O'Connor, J., concurring) ("Lack of proportionality is probative evidence of vote dilution."), made it quite likely that a court would have required the same number of majority-minority districts, in the same basic areas, as those adopted by the State. Certainly, a State has a compelling interest in complying with such a legal requirement. *See Shaw*, 113 S. Ct. at 2830.

As for narrow tailoring, it would be a mistake once again to give any weight to the fact that the particular

districts created were not very compact. Since the Constitution does not require a State to follow this principle in districting, and Texas does not do so as a general matter, the State should be equally free to sacrifice compactness in pursuit of other state policies when it is drawing districts to maintain compliance with the Voting Rights Act. Although the possibility of a "sufficiently . . . geographically compact" district is a prerequisite to a finding of liability under Section 2, *see Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), there is no reason to require the State, in its compliance efforts, to create that particular district. *See Shaw v. Hunt*, 861 F. Supp. 408, 454-55 n.50 (E.D.N.C. 1994) (three-judge court), *prob. juris. noted*, 115 S. Ct. 2639 (1995); *see also* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J. L. & Pol. 345, 388-89 (1992). To do so would be to require the State to subordinate its own policies, without in any way promoting greater compliance with federal law. *Cf. White v. Weiser*, 412 U.S. at 793-97. Put differently, there is no reason why Texas could not, in its efforts to create new districts required by the Act, also adhere to its policy of incumbent protection by making those districts more irregular in shape.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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